No. 90-245

In The

Supreme Court of the United States

October Term, 1990

REX A. SHARP, KEITH WILSON, JAMES H. MORAIN, DANIEL H. DIEPENBROCK, and TAMMIE E. KURTH, as individuals, NEUBAUER, SHARP, McQUEEN, DREILING & MORAIN, P.A., as a firm, and ALL OTHER LAWYERS AS A CLASS REQUIRED BY THE STATE OF KANSAS TO REPRESENT KANSAS INDIGENT CRIMINAL DEFENDANTS,

Petitioners,

v.

THE STATE OF KANSAS,

Respondent.

PETITIONERS' REPLY BRIEF

REX A. SHARP
419 N. Kansas – P.O. Box 2619
Liberal, KS 67905-2619
(316) 624-2548
Counsel of Record
for Petitioners

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REASONS FOR GRANTING THE WRIT

I. *HANS* SHOULD BE OVERRULED.

The State of Kansas does not even cite *Hans v. Louisiana*, 134 U.S. 1 (1890), or address Plaintiffs' arguments of why it should be overruled. Instead, the State generally suggests that all of the arguments against the *Hans* interpretation of the Eleventh Amendment were made and rejected in *Welch v. Dept. of Highways & Public Transp.*, 483 U.S. 468 (1987). Such a broad assertion, without illustration or argument, by the State is erroneous. *Welch* considered numerous arguments for and against the continued reliance on *Hans*, but not "every" argument was considered, nor were all considered arguments rejected. Indeed, *Welch* was a plurality opinion, with Justice Scalia not even reaching the *Hans* issue. The State did not even bother to cite or discuss the Eleventh Amendment cases after *Welch*. Nor did the State mention any justifications for *Hans* on *stare decisis* grounds or refute any arguments made in Plaintiffs' initial brief.

The State also boldly asserted and concluded that this case is not the case in which the balance of power between the states and federal government should be changed. The State did not offer any reason why this case, as opposed to another one, would not be an appropriate vehicle to reverse *Hans*. The State's unsupported conclusionary statement, much as its cursory analysis of *Welch*, is not persuasive.

The Eleventh Amendment, as written, created a balance between state and federal government for over 90 years. There was no perceived need for a doctrinal change away from the clear words of the Eleventh

Amendment until something as significant and dramatic as the Civil War, and Reconstruction, occurred. Under the political pressure of the Reconstruction years, *Hans* may have made short term political sense, but was bad law then and is bad law now. *Hans* did not result in a "balance", rather it weighed too heavily in favor of state sovereignty, and, as a consequence, immediately began crumbling under its own weight. Since *Hans* was announced, the injustices imposed by *Hans* have never been accepted by any of the Supreme Courts, as shown by the numerous exceptions adopted by this Court. Expansion of those exceptions continue to be necessary in modern times. *See Pennsylvania v. Union Gas Co.*, 491 U.S. ___, 195 L.Ed. 2d 1 (1989). The workable and true "balance" of the Eleventh Amendment should be restored as it was before *Hans* by construing the Eleventh Amendment exactly as written, proposed, and ratified. *Stare decisis* is insufficient to justify the incorrect and unjust *Hans* interpretation of the Eleventh Amendment any longer. *Hans* should be overruled.

II. IF *HANS* IS NOT OVERRULED, CONGRESSIONAL ABROGATION APPLIES IN THIS CASE.

The State in its brief did not even argue this issue, or even assert that congressional abrogation did not apply in general terms. If *Hans* has continuing validity, the congressional abrogation exception must continue to be applied to ameliorate the unjust general rule adopted in *Hans*.

III. IF *HANS* IS NOT OVERRULED, THE CONSTITUTIONAL ABROGATION EXCEPTION GRANTS FEDERAL COURT JURISDICTION.

The constitutional abrogation exception was never discussed, even generally, by the State in its brief. Again, if *Hans* has any continuing validity, the Eleventh Amendment can be overcome by constitutional amendments, especially those adopted after the Eleventh Amendment, to ameliorate the unjust general rule adopted in *Hans*. If federal law can overcome the *Hans* doctrine under the congressional abrogation exception, then the Constitution itself should also be superior.

IV. PENDENT JURISDICTION APPLIES TO THE INSTANT CASE.

Again, the State did not even address the pendent jurisdiction issue.

V. ONLY THE JURISDICTIONAL ISSUE OF THE ELEVENTH AMENDMENT IS BEFORE THIS COURT, AND FEDERAL COURTS PROPERLY HAVE JURISDICTION OF THIS CASE UNDER THE ELEVENTH AMENDMENT.

The State, rather than address the Eleventh Amendment issue, spent most of its three page brief arguing the merits of a suit now pending in the state district court and the merits of a similar (but not identical case) now pending before this Court, which Plaintiffs and the State have already briefed. *See Sharp v. Kansas*, ___ U.S.L.W. ___ (U.S. June 12, 1990) (No. 89-1978) (*Sharp I*). For the reasons set forth in Plaintiffs' brief in *Sharp I*, Plaintiffs

believe that the Kansas state court decision on the merits is erroneous, illogical, and without any legal support, even by inference, but this is not the place to argue the merits. The State's arguments on the merits of *Sharp I* should be disregarded in this case, and considered in the case in which the issues are properly raised and before the Court.

Therefore, the Petition for Writ of Certiorari should be granted, federal jurisdiction upheld, and the case remanded for discovery and trial on the merits.

Respectfully submitted,

REX A. SHARP
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Liberal, KS 67905-2619
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Counsel of Record
for Petitioners